SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1054

THE STATE NATIONAL BANK OF MARSHALL, In Liquidation,

Petitioner.

vs.

W. D. TITTLE

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the Texas Supreme Court is reported in 183 S. W. (2d) (Adv.) 720, and that of the Texas Court of Civil Appeals in 179 S. W. (2d) 1010.

II

Statement of the Case

We adopt by reference paragraphs A, B4 and C of our foregoing petition. Most of the questions presented center around the conduct of respondent and Vice President Thomas on December 31, 1941. Without question, the sole

written evidence of that conduct was the execution by respondent of a promissory note for $3,000.00 with interest at 8%, payable to petitioner 30 days after date (R. 128-29); the issuance of a deposit slip showing that the principal of the note was placed in the deposit account of respondent on the same date (R. 131); and the issuance of a check against respondent's account for the amount of the note, payable to W. M. Thomas, and bearing equal date with the note and deposit slip (R. 132). Contemporaneously, Thomas signed a promissory note for the same amount and rate of interest, made payable and delivered to respondent (R. 123, 131). The check was stamped paid January 2, 1942 (R. 132), on which date a deposit of $6,000.00 was made in the W. M. Thomas account (R. 163).

Thomas testified that the transaction amounted to what the written evidence suggested, a purely personal loan to him by Tittle, the amount of which Tittle borrowed from the Bank (R. 150), and we contend the jury so found (Issues 14 through 17, R. 41-42). That there was no agreement whatever about the Bank holding any funds out of any Brick Co. contract, and to quote him:

> "Q. Did you in this transaction with Mr. Tittle at any time make any agreement on the part of the Bank that the Bank would hold money out of funds that the Brick Company was receiving out of the contract and apply on Tittle's note?
>
> A. I did not; I don't think a bank could do that" (R. 150-51).

Further, Thomas testified that he had put between $25,000.00 and $30,000.00 more into the Waterman Brick & Tile Co. than he had realized therefrom; that the investment was a purely personal transaction and that the bank had no interest in the same; that at the time of the transaction with respondent Thomas had a financial interest in the Brick Co. (R. 151). In fact, on January 20, 1942, the bank examiner

reported there was a debt to Thomas by the Brick Co. in the sum of $12,000.00, which debt Thomas had verbally subrogated to the debt that the Brick Co. owed the petitioner (R. 171).

Tittle, a small groceryman (R. 126), testified to the following remarkable transaction with Thomas: The latter called him into his office and stated that the Waterman Brick & Tile Co. had a large overdraft in the bank, and that Thomas "wanted me (Tittle) to loan the bank $3,000.00 to take up the overdraft, wanted it five or six days" (R. 123). That Thomas looked for money every day from a government contract (of the Brick Co.) which would be applied on the note, and again quoting: "He (Thomas) said I would never have to pay it" (R. 123). Tittle further testified that his note and the check to Thomas were made out by Thomas, and thereafter he was given a deposit slip and Thomas' note, in the nature of a guaranty (R. 124).

On cross-examination, Tittle testified that Thomas had told him beforehand that he had an interest in the Waterman Brick & Tile Co. (R. 127); that he owned a lot of stock and was operating it, or aiding in its operation (R. 157). Also, that nothing was said in the conversation to indicate that the Bank was going to do anything with the Brick Company's funds (R. 127-128), and particularly referring to that portion of the conversation about applying the Brick Co. funds on the note, we quote respondent:

> "Q. As you have said, that (was) no part of the agreement and nothing was said about the Bank taking the Brick Company's money and putting it on the note?
>
> A. He said the Bank wanted to borrow the money, and the first money that came in would apply it on the note.
>
> Q. He didn't say the Bank would apply it on the Note?
>
> A. He didn't say who would apply it.

Q. He didn't say the Bank would apply it?
A. No, sir." (R. 128).

Tittle also testified that he knew he was giving the Bank an instrument that on its face showed an absolute obligation for him to pay it, and which could be negotiated "just like greenbacks" (R. 129). That he did not trust Thomas to make any changes on the note, and knowing none would be made thereon, turned the same aloose on the Bank as an obligation perfectly valid on its face (R. 129). That he knew of the existence of bank examiners, who examined banks and listed the assets and liabilities thereof (R. 130). On the question as to Respondent's purpose in executing the note, under the verbal agreement, we quote him as follows:

"Q. Then you were giving a note to take up an overdraft the Bank couldn't carry on their books?
A. Yes, sir" (R. 135). * * *

"Q. You knew that when you gave that bank that note that it couldn't collect it, that it had gotten a fraudulent instrument to make its books show they didn't have an overdraft of the Waterman Brick & Tile Company?
A. I didn't know; he told me — wanted to get $3,000.00 to take up an overdraft.
Q. And couldn't carry it on the books?
A. Yes, sir.
Q. And had to have some assets to take the place of the overdraft?
A. Said they wanted to borrow the money." (R. 135-36) * * *

"Q. You knew this note was used to take up the overdraft, what he was to have used the money for?
A. What he told me he wanted to borrow the money for.
Q. You knew the note would go in as a part of the assets of the bank?
A. Yes, sir.
Q. You knew the overdraft was being wiped out by the note?

A. Yes, sir.

Q. You knew the note with your trade with Thomas, was not to be paid by you?

A. He said I wouldn't have to pay it.

Q. You knew the bank's records had been altered to show the overdraft taken up by the note didn't you?

Mr. Abney: If he admits the record was altered——

(Interrupted)

Mr. Jones: Kill the question.

Q. You know (knew) the bank records would show the note as an asset instead of an (the) overdraft?

A. Yes, sir'' (R. 139-40).

In view of the fact that the jury resolved the issues of fraud in procuring renewals of the original note against petitioner, we do not treat the evidence on that subject. The striking down of the renewal notes left unimpaired the obligation of respondent to discharge the unpaid portion of the debt created December 31st, 1941, if our contentions are correct.

H. F. Holland, assistant cashier of petitioner, testified from its records that the Waterman Brick & Tile Co. had a balance of $7.70 in its account on December 31, 1941, having no overdraft in the bank (R. 140). That the Bank had paid some of respondent's checks, but was carrying the same as cash items, and had not charged them to the account of the Brick Co. (R. 140-41). Holland testified that he knew where the funds secured from Tittle on the note went; that they did not go to take up any of the checks of the Waterman Brick & Tile Co. that were being carried as cash items on December 31, 1941, and did not go to the Brick Co. account (R. 141, 162); that the ''cash item checks'' were paid by deposits of the Brick Co. realized from the sale of its products (R. 162). That there were no credits of the Wa-

terman Brick & Tile Co. to Thomas until January 19th, 1942 (R. 162).

Holland further testified that the Bank had what is known as a Discount Committee, which met whenever necessary, and had the function of passing upon credits and applications, as well as loans already made (R. 162). The Committee was composed of the President, Cashier and two directors appointed by the Board every six months (R. 169), and had the duty of submitting in writing a report of all notes discounted etc. by the bank at each regular meeting of the Board, and which directors approved or disapproved such report (R. 169).

John E. Harter, one of the directors, served on this Committee and testified that it had fixed a limit of $500.00 to $1,000.00 for the bank officials to make loans on (R. 165), the Committee passing upon the credit of applicants for larger amounts. On cross examination, he testified that he was sure respondent had a line of credit before Thomas made the loan in question (R. 166). The Board of Directors of the Bank met the 20th of each month (R. 168).

On January 1, 1942, until the bank closed in July, it was never brought to the attention of the Discount Committee or the Board of Directors that Respondent had loaned money to the Bank, according to Harter (R. 165). Indeed, Holland testified that there had never been a transaction in the history of the bank where money was loaned to it as testified by respondent herein, the method of borrowing as indicated by the minutes of the Board of Directors in 1929, being the only one known to him (R. 161). That at the time respondent claims to have loaned petitioner the money, it had the means of using some $300,000.00 in cash (R. 168). Roy Marcom, Vice President and Cashier of the Marshall National Bank, and with many years experience both as banker and examiner, testified that it was not

customary for a National Bank to engage in a transaction such as that narrated by respondent (R. 147 et seq.).

We regret that the opinion of the Texas Supreme Court has, to our mind, made necessary the preceding comprehensive statement of the facts. It will be seen that such Court made no effort to state the facts, further than the statement that: "Tittle's testimony substantially supported his allegations (Op. 183 S. W. (2d) 721)." We sincerely believe that many of the facts above summarized are in conflict with Tittle's allegations. We respectfully pointed this out to the Texas Supreme Court by Motion for an enlargement of the opinion dealing with the facts, which Motion was denied without opinion (R. 98).

III

Specification of Errors and Summary of the Argument (Presented as Points)

Point One

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE SECRET VERBAL AGREEMENT OF DECEMBER 31, 1941 DID NOT OPERATE TO CONCEAL AN EXISTING EXCESSIVE LOAN TO THE BRICK CO. BY PETITIONER, OR TO CREATE AND CONCEAL A NEW EXCESSIVE LOAN TO IT IN VIOLATION OF THE TERMS AND POLICIES OF THE NATIONAL BANKING ACT; AND THAT THE FAILURE OF PETITIONER TO APPLY THE BRICK CO. FUNDS ON RESPONDENT'S NOTE OPERATED TO DISCHARGE IT.

Point Two

THE SUPREME COURT OF TEXAS ERRED IN HOLDING AS A MATTER OF LAW THAT THOMAS ACTED AS THE AGENT OF THE PETITIONER IN MAKING THE VERBAL AGREEMENT OF DECEMBER 31, 1941, DESPITE THE UNDISPUTED EVIDENCE, THE VERDICT OF THE JURY, AND THE IMPLIED FINDINGS OF THE TRIAL COURT, ALL TO THE CONTRARY.

Point Three

THE TEXAS SUPREME COURT ERRED IN HOLDING PETITIONER WAS CHARGED WITH KNOWLEDGE OF THE VERBAL

AGREEMENT OF DECEMBER 31, 1941, UNDER THE "SOLE ACTOR" DOCTRINE; NOTWITHSTANDING THE JURY VERDICT AND IMPLIED FINDINGS OF THE TRIAL COURT TO THE EFFECT THAT THOMAS ACTED IN A PURELY PERSONAL CAPACITY IN MAKING THE AGREEMENT, IN FRAUD OF PETITIONER, AND THAT IT WAS TO HIS DEEP FINANCIAL INTEREST NOT TO DIVULGE THE EXISTENCE OR NATURE OF THE AGREEMENT TO PETITIONER.

Point Four

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE VERBAL AGREEMENT OF DECEMBER 31, 1941, MADE CONTEMPORANEOUSLY WITH THE EXECUTION OF RESPONDENT'S NOTE, DID NOT CHANGE THE MANNER AND TIME OF PAYMENT OF THE ORIGINAL NOTE, IN VIOLATION OF THE PAROL EVIDENCE RULE.

ARGUMENT

Point One (Restated)

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE SECRET VERBAL AGREEMENT OF DECEMBER 31, 1941 DID NOT OPERATE TO CONCEAL AN EXISTING EXCESSIVE LOAN TO THE BRICK CO. BY PETITIONER, OR TO CREATE AND CONCEAL A NEW EXCESSIVE LOAN TO IT IN VIOLATION OF THE TERMS AND POLICIES OF THE NATIONAL BANKING ACT; AND THAT THE FAILURE OF PETITIONER TO APPLY THE BRICK CO. FUNDS ON RESPONDENT'S NOTE OPERATED TO DISCHARGE IT.

Argument and Authorities under Point One

On December 31, 1941, the Waterman Brick & Tile Co. owed petitioner bank $14,406.46, and the legal limit that the bank could loan to one customer was $15,000.00 (R. 105). Some time before, H. F. Holland, holding a position in the bank subordinate to Vice President Thomas, had called to the attention of Thomas that there were checks against the Brick Co. in the drawer which had not been charged to it, whereupon Thomas "got me (him) told that it wasn't any of my business; that he was seeing after it himself and from then on I let him see after it" (R. 105-106). Holland never reported this to the directors (R. 106). Thenceforward Holland's knowledge of the Waterman ac-

count was casual, but Thomas supposedly authorized the bank employees to pay the checks which could not be put on the Waterman account because it would be shown over the limit, and the checks would be carried as cash items (R. 106).

On December 31, 1941, there were checks against the Brick Co. in the aggregate sum of more than $8,000.00, carried as unidentified cash items, and not charged against its account (R. 116). In this situation, respondent freely admits that he gave the controversial note "to take up an overdraft that the bank could not carry on their books" (R. 135-36); that he knew the bank records would show the note as an asset instead of the overdraft (R. 139-40); and that the note was not to be paid by him, but from funds received by the Brick Co. from a government contract (R. 123-24).

Respondent knew of the customary business method of listing assets and liabilities (R. 126), and likewise knew of the existence of bank examiners, and of their custom of examining banks and listing their assets and liabilities (R. 130). Should we disregard the undisputed fact that the proceeds of respondent's note were not applied on the Brick Co. checks (R. 141, 162), this is the situation: Thomas was improperly carrying the checks as cash items, rather than showing them as overdrafts (*Bacon* v. *U. S.*, 97 Fed. 35, 38 C. C. A. 37, 45 and see 85 A. L. R. 832). To charge them against the Brick Co. account as overdrafts, would show an indulgence beyond the liability limits fixed by 12 U. S. C. A. Section 84 (*McCormick* v. *King, et al.*, 241 Fed. 737, 154 C. C. A. 439, 445). The natural consequence of respondent's agreement was to substitute his note, as an apparently unqualified asset, in order to remove the checks as cash items, or in his language to "take up an overdraft". But the fraud and viciousness in the scheme arise from the fact that respondent's note was not, under his

verbal agreement, *an unqualified asset*, but to the contrary constituted an obligation to be primarily discharged by the Brick Co.

The sole basis of distinction that the courts below made between the present situation, and that presented in the *Deitrick*[5] and *D'Oench*[6] cases, is that respondent testified in effect that he was to pay his note, *if* the Brick Co. funds did not discharge it. Such Appellate Courts both seem to arrive at this conclusion, by reason of the fact that the Brick Co. incurred no liability by the transaction, or in the words of the Texas Supreme Court: "—never became liable on the note as an undisclosed principal." The court doubtless overlooked the earlier parts of its opinion to the effect that the Brick Co. agreed through Thomas for its funds to pay the note, and that Respondent would never be called upon to pay it (183 S. W. (2d) Adv. 720-721). The Texas Courts both concluded that the note was paid by the deposit of Brick Co. funds with petitioner. Most certainly, it will not be suggested that the bank has lost the debt through its failure to enforce it against the funds of a party not liable thereon. So to suggest would place the bank in the position of having to either apply the Brick Co. funds on the loan, and lose them on a subsequent claim of the Brick Co. that it did not owe the debt, or of failing to apply the funds on the loan, on penalty of the court holding that the note was paid thereby. A more shattering blow to general confidence in the institution of banking could hardly be imagined.

Conceding that the Brick Co. was not liable on the note "as undisclosed principal," it nevertheless became liable on the debt evidenced by the note, through the verbal agreement that amounted to an assumption thereof (See 2 Am.

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[5] *Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, 697 et seq.

[6] *D'Oench Co.* v. *F. D. I. Co.*, 315 U. S. 447, 86 L. Ed. 956.

Jur. Agency Suppl. Sec. 397; 130 A. L. R. 667, and cases there treated). Our conclusion is, that the verbal agreement made the Brick Co. the principal obligor on the debt; but it would seem to make little difference whether it became principal or surety, in that the agreement and conduct of respondent concealed the true transaction. The Commission of Appeals (adjunct of the Supreme Court of Texas) spoke as follows in the case of *Wilson* v. *J. W. Crodus Drug Co.*, 222 S. W. 223, 224;

> "It is well established that, where an assumption has been accepted by the payee, the assumptor becomes the principal and the original debtor is surety as to the creditor, unless otherwise specially contracted by the parties." (Citing authorities.)

Where the placing of an apparently unqualified note among the assets of a bank operates to conceal from the examiner the improper indulgence of a customer, we can see no difference between an agreement that the maker is not liable on the note, and one that he will never have to pay it, because the future deposits of such customer will discharge it. The difference would seem to be one of degree only. The vice lies in the deceit of the examiner, and not the particular process by which it was brought about.

There is no doubt that the bank examiner was actually deceived, in that he classified the obligation of the Brick Co. as excessive by reason of only one cash item of $3,000.00 (R. 171); whereas such Company had assumed the debt evidenced by respondent's note, in order for an overdraft not to appear on the bank books. This note was carried as an unqualified asset on the records of the bank through the same examination, which was made January 20th, 1942 (R. 161). Had the note not been so carried, and the overdraft or "cash item," not concealed thereby, there is no doubt but that the bank examiner would have caused the

concealed debt of the Brick Co. to be paid or lifted. In fact, such was exactly what was done with a different $3,000.00 "cash item" that had not been concealed, and which was paid by Thomas during the examination (R. 114, 170, 171, 161). This compels the conclusion that the Bank would not have lost the amount concealed by Respondent's note, had the amount evidenced by the note been properly entered as a cash item or overdraft of the Brick Co.

The Texas Courts ignore the undisputed facts (R. 141-42, 162) to say that the Petitioner received a benefit from the verbal agreement, through application of the proceeds of the note on the Brick Co. overdrafts. Never has the writer seen a "benefit" more cleverly disguised. Taking the conclusion of the courts at face value, the "benefit" received amounted to the bank giving up its valuable right of direct set off against the Brick Co. account, for the doubtful privilege of applying the funds received from the note on the overdrafts, and then relying upon the verbal agreement of the Brick Co. for its future funds to be applied on the note. The "benefit" further was to operate through a verbal agreement, nowhere spread upon the records of the bank, and knowledge of which it must have gained from Thomas alone. As we shall presently demonstrate, the bank had no actual knowledge of the transaction, and should be charged with none through Thomas. But even if it had knowledge, did it not suffer the detriment of being unable to make direct set off of the overdraft against the Brick Co. deposits, for the uncertain one of applying the deposits on a note that no written record showed the Brick Co. to owe? Even should we assume that Thomas failed to make the credits through inadvertence, the loss would not have occurred had the overdraft been continued as cash items. The deposits would have then been automatically

credited to the Brick Co. overdraft, shown by the checks or records.

We cannot believe that one who aids a bank officer to deceive a bank examiner through false entry should have his rights measured by the question of whether a benefit or a detriment resulted to the bank by his actions. The very terms of 12 U. S. C. A., Sec. 592, make punishable anyone who makes any false entry, and we quote: "To deceive any officer * * * or the Comptroller of the Currency * * * or examiner." The existence of a loss or injury to creditors was specifically held to be immaterial to the striking down of an agreement, such as respondent's, in *Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, 698. Later, in *D'Oench, etc.* v. *Fed. Dep. Ins. Corp.*, 315 U. S. 447, 86 L. Ed. 956, 964, this court further said:

> "And it is no more a defense here than it was in the Deitrick case that no damage was shown to have resulted from the fraudulent or unlawful act. The federal policy expressed in the Act, like its counterpart in state law, is not dependent on proof of loss or damage caused by the fraudulent practice.
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> Though petitioner was not a participant in this particular transaction and, so far as appears, was ignorant of it, nevertheless it was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert that the federal policy to protect respondent against such fraudulent practice should not bar its defense to the note. Criminal penalties are no more the sole sanctions of the federal policy expressed in this Act than were the criminal penalties imposed on the agreement in the Deitrick case. If the secret agreement were allowed as a defense in this case the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible. The federal policy

> under this Act of protecting respondent in its various functions against such arrangements is no less clear or emphatic than the federal policy of outlawing purchases by a bank of its own stock involved in the Deitrick case. Cf. Rinaldi v. Young 67 App. D. C. 305 92 F. (2d) 229, supra; Federal Deposit Ins. Corp. v. Woods (D. C.) 34 F. Supp. 296."

We can see no distinction between the giving of the note in the *Deitrick* case to conceal the bank's illegal purchase of its own stock, or the giving of the note in the *D'Oench* case to conceal the showing of past due bonds on the bank records, and the giving of respondent's note herein to conceal the existence or creation of an improper indulgence of the Brick Co.

The striking similarity between the pleading and proof in this case, and the defendant's allegations in the case of *First National Bank* v. *Boxley*, 129 Okla., 159, 264 Pacific 184, 64 A. L. R. 588, prompts us to quote the latter as follows:

> "* * * that the said bank through its agents represented to this defendant and to the other persons who signed said notes that, if he would sign a note to the plaintiff bank, being the note herein sued upon, they would carry the same as an asset of said bank, and that the excess loan made by the said bank to the said John W. Gilliland and the Gilliland Oil Company would not appear on the books of the said bank as an excess loan and the said note to be carried by the said bank as an asset, but that the said bank would not look to this defendant for the payment of said note, but would collect the same from the said Gilliland Oil Company; that in furtherance of this situation it was agreed between the said bank and this defendant that this defendant would not be bound by said note, but was simply making the same for the accommodation of the First National Bank of Tulsa, and that the said note would not be the obligation of this defendant; * * *"

In disallowing the defense indicated by this pleading, the Oklahoma Court said:

> "To sanction any arrangement whereby the real assets and securities of the bank are to be regarded as less than or different from the apparent assets and securities would tend to defeat the entire purpose of the regulatory statutes. Parties may not participate in a transaction the object of which is to give to the assets of a bank a favorable appearance for the purposes of examination, but less favorable for the purposes of liability or enforcement. The defendant having signed said note, and it being a part of the bank's assets, an understanding or agreement of nonliability would be neither proper nor tenable. It would amount to a fraud upon the depositors, stockholders, and the public to permit an agreement that the obligation which the defendant assumed was in fact not an obligation."

We appreciate that it is held in some jurisdictions that the receiver of a bank may recover on a note such as Respondent's, but the bank itself may not do so. We think the answer to this suggestion found in the case of *Rogers* v. *First State Bank*, 79 Colo. 84, 243 Pac. 637, 64 A. L. R. 595, to be beyond challenge, as follows:

> "If logically followed out, defendant's argument by reductio ad absurdum, means that it is proper to lock the stable after the horse has been stolen, but not before. This naturally follows, for if the looting must be permitted to continue until a receivership or liquidation, by that time there may be nothing left for the receiver to take over, except, possibly, the secondhand bank fixtures, if that much, the other assets of the bank having been previously dissipated, leaving nothing but an empty shell for the creditors."

The facts in *Livestock State Bank* v. *First National Bank*, 300 Fed. 945, 950 et seq. are similar to those here presented. There the Rocking "H" Company, whose financial agent

was the cashier of the Fairfield Bank, desired to make a loan which was greater than such bank could legitimately allow it. The Livestock Bank contended that the Fairfield Bank had actually made the loan, but had taken from the Rocking "H" Company a note made payable to the Livestock Bank. That the Rocking "H" note was forwarded to the Livestock Bank upon agreement that at maturity it would be charged against such bank's account with the Fairfield Bank. Of this conduct, the court said:

> "The wholesome limitation established by the federal statutes must be circumvented, and hence the sinuous, under cover course of procedure. Business institutions of large affairs and numerous transactions do not withhold the details thereof from their books, and commit to secret oral understandings the evidence of important rights and obligations, unless there is cogent reason for concealment." * * *
>
> "To circumvent the wholesome limitation of the law, the plaintiff entered into a secret agreement with Horal, by which, for his benefit, indirectly, but in effect, his bank loaned eight times its maximum capacity, and assumed an obligation greatly exceeding its entire capital; a secret agreement, the purpose of which was to withhold from the Comptroller of the Currency knowledge of a most vicious excess loan, and the natural result of which was to conceal the true nature of the transaction and the true condition of the Fairfield bank from its stockholders and depositors and officers other than Horal." * * *
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> "Without further discussion, it is held that the alleged agreement, if made, was immoral, contrary to public policy, and fraudulent as against the Comptroller of the Currency, as well as the stockholders and depositors of the bank."

In conclusion, we respectfully suggest that the situation presented in this case lies beyond the reach of the decision

in the Texas case of *Goldstein* v. *Union National Bank, et al.*, 109 Tex. 555, 213 S. W. 584. However, should we be mistaken, much has occurred to the institution of banking since that decision, not the least of which has been the reforms beginning with the Banking Act of 1933. There has been a wholesome tendency to divorce the calling of banking from that of speculating. For example, in the *Goldstein* case one of the co-makers of the note in question was Vice President of the National Bank that made the loan; and nothing out of the way was seen in this by the majority opinion therein. It should not be suggested that such a transaction, whereby a bank officer may act both as lender for the bank and borrower for himself would be upheld by the federal decisions today (see *Fed. Dep. Ins. Co.* v. *Vest*, 122 Fed. (2d) 765). We respectfully insist that if there be anything in the *Goldstein* case contrary to the federal cases which we believe we have shown support our conclusions, that that case should be overruled. Certainly, the Texas Supreme Court should not be allowed to follow it in defiance of the contrary pronouncements of this Court on the same subject.

Point Two (Restated)

THE SUPREME COURT OF TEXAS ERRED IN HOLDING AS A MATTER OF LAW THAT THOMAS ACTED AS THE AGENT OF THE PETITIONER IN MAKING THE VERBAL AGREEMENT OF DECEMBER 31, 1941, DESPITE THE UNDISPUTED EVIDENCE, THE VERDICT OF THE JURY, AND THE IMPLIED FINDINGS OF THE TRIAL COURT, ALL TO THE CONTRARY.

Argument and Authorities under Point Two

Thomas testified that he did not act for the bank in making any agreement that it would hold money out of the Brick Co. funds, and apply the same on respondent's note (R. 150-51). Respondent testified positively that Thomas did not say that the Bank would apply Brick Co. funds on the note (R.

128), and that there was nothing in the conversation between him and Thomas to indicate the Bank was going to do anything with the Brick Co. funds (R. 127, also see 136-37).

The jury found that respondent both borrowed the money, and executed the note of December 31, 1941, for the sole purpose of procuring the same and loaning it to W. M. Thomas personally (Issues 14 and 15 R. 41-42). In obedience to these findings, the trial court entered judgment for petitioner (R. 45).

First, it appears that the evidence was undisputed that Thomas acted either for himself or the Brick Co. in entering into the verbal agreement as to the payment of the note. However, if it could be said that there is room for minds of reasonable men to differ on the subject; yet the implied finding of the trial court must be in accordance with the judgment entered on the verdict. A necessary part of the defense urged by respondent, in the nature of the verbal agreement, was that Thomas acted as the agent of the bank in the transaction. Texas Rule of Civil Procedure 279, (see Appendix A), plainly states that where one of the component issues necessary to a defense is submitted, but others are omitted without objection, and we quote: "* * * such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment". The present eminent Chief Justice of the Texas Supreme Court has precisely upheld our contentions under this rule, as will be seen from consulting Appendix B.

It cannot be successfully contended, that the submission of the issue as to whether the agreement was made by Thomas presented the complete defense pleaded by reason of the agreement. Unless Thomas acted as the agent of the Bank in making the same, naturally the bank was not bound thereby. Thus, it was necessary for the respondent to pro-

cure a finding, if the evidence raised the issue, that Thomas did so act as the agent of the Bank. In failing to do this, respondent is bound by the contrary implied finding of the trial court in support of judgment.

Another reason for the inescapable conclusion that the trial court found Thomas not to be the agent of the bank, arises from the manner of submission of Issues 14 and 15. We frankly think that these Issues standing alone constitute a finding that Thomas acted personally. But if they do not, most certainly they constitute the submission of one of the Issues necessary to establish that Thomas acted in his own behalf in the transaction, and not for the bank. With one of such issues submitted, and no objection having been made at the failure to submit others, any omitted issue as to the capacity in which Thomas acted was impliedly found by the trial judge for petitioner, and in support of Judgment.

The Texas Supreme Court granted the Writ of Error on the point in petitioner's Application raising the above contentions. It will be observed that it did not discuss this point at all in the opinion, and simply glossed over the subject by saying that the conduct of Thomas "was clearly within the scope of Thomas' general agency." The obvious reply to this statement is, that likewise the conduct of Thomas was wholly consistent with the conclusion that it was beyond the authority vested in him by the Bank, or even his general agency. Certainly, the mere fact that an agent *may* have acted within his general agency will not be allowed to destroy a finding on contradictory evidence that he *did not* so act. Yet, this is exactly what the Supreme Court of Texas attempted to do by its decision in this case.

Point Three (Restated)

THE TEXAS SUPREME COURT ERRED IN HOLDING PETITIONER WAS CHARGED WITH KNOWLEDGE OF THE VERBAL AGREEMENT OF DECEMBER 31, 1941, UNDER THE "SOLE ACTOR" DOCTRINE; NOTWITHSTANDING THE JURY VERDICT AND IMPLIED FINDINGS OF THE TRIAL COURT TO THE EFFECT THAT THOMAS ACTED IN A PURELY PERSONAL CAPACITY IN MAKING THE AGREEMENT, IN FRAUD OF PETITIONER, AND THAT IT WAS TO HIS DEEP FINANCIAL INTEREST NOT TO DIVULGE THE EXISTENCE OR NATURE OF THE AGREEMENT TO PETITIONER.

Argument and Authorities under Point Three

Before December 31, 1941 Respondent had been told by Thomas that the latter owned a lot of stock in the Waterman Brick & Tile Co. and was operating it, or aiding in its operation (R. 127, 157). Thomas testified that he put between $25,000.00 and $30,000.00 more into the Brick Co. than he realized therefrom (R. 151). In referring to the account of the Brick Co. with the bank on January 20, 1942, the bank examiner reported: "The Company owes Vice President Thomas $12,000.00, which has been verbally subrogated to the bank's debt" (R. 171).

We have earlier pointed out (Point Two) that if the evidence raised a fact issue as to the capacity in which Thomas acted, the same was resolved by the Trial Court in favor of the petitioner. Regardless of any finding on the facts, we contend that they establish as a matter of law that Thomas' knowledge of the agreement was not imputed to petitioner. His interest in the matter was so antagonistic to that of petitioner, as that he must conclusively be deemed to have dealt with petitioner at arm's length.

The only basis for the conclusion of the lower appellate courts that petitioner had knowledge of the agreement, rests in the application of the "sole actor" doctrine. These courts seem to proceed on the theory that notwithstanding the fact that Thomas had adverse interests to his principal;

since he acted alone for it in the transaction, it is charged with his knowledge thereof. We do not believe there is a single federal decision which holds the principal charged with the knowledge of an agent that acts for his own benefit and at the expense of his principal, as well as that of the other party. Mr. Justice Harlan refused to do so for this court in the case of *American Surety Co.* v. *Pauly*, 170 U. S., 133, 156, 158, 159, 42 L. Ed. 977. In the course of the opinion, Pomeroy on equity was favorably quoted as follows:

> "It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fradulently concealed."

We digress from the treatment of the authorities long enough to point out that respondent procured a finding of the jury to the effect that at the time Thomas made the agreement of December 31, 1941, he did not intend to perform the same (Issue 4 R. 39). Bearing in mind that the agreement contemplated the taking of the Brick Co. funds and applying them on respondent's note, how can it be said that Thomas' agency with petitioner was not destroyed by his intention to defraud "his own principal * * * as well as perhaps the other party"? The lower courts have held that the failure to carry out the agreement on the part of petitioner has relieved respondent of liability on the note. What chance did petitioner have of learning of the agreement through Thomas, when the latter did not intend to

perform the same when he entered into it? Should the wildest presumption suggest that Thomas would have notified other agents or officers of petitioner of the existence of the agreement so that they could perform it, when Thomas did not intend to see it performed? We do not ask these questions in an accusatory manner, but to us they are burning ones that should have been answered by the lower courts, and which were apparently overlooked by them.

That the fraud of Thomas against his principal redounded to his credit leaves little room for doubt. Aside from the heavy financial investments that he had in the Brick Co., the examination of the bank on January 20, 1942 shows that such Company owed him personally $12,000.00; and that such amount was subrogated to the amount the Company owed his principal. It must be said that it was to the interest and benefit of Thomas to see the note given by respondent paid otherwise than from the Brick Co. funds. It was not to the interest or benefit of Thomas for the Brick Co. funds to be used in repaying its obligation to the bank (by discharging respondent's note), when Thomas had a $12,000.00 note of the Brick Co. that was subrogated to its loan from the bank.

In *American National Bank* v. *Miller*, 299 U. S. 517, 57 L. Ed. 1310 the dominating officer of a Macon bank, one Plant, became insolvent while a large overdraft was held against him by the bank. He gave the Macon bank a $3,000.00 check on an account he had in a Nashville bank, which upon transmittal was credited to the account of the Macon bank in Nashville. Upon suit by the Macon bank, the Nashville bank contended that Plant's knowledge of his own insolvency, as president of the Macon bank, was notice to the bank thereof. In holding that the Macon bank was not charged with notice, this court said:

> "On May 13th Plant was indebted to the Macon Bank on this account between $75,000.00 and $100,000.00.

A national bank examiner was in the city, and it was expected that he would examine the books of the Macon bank within a few days, when this *illegal overdraft* by the president would appear. Rev. Stat. 5200, U. S. Comp. Stat. 1901, p. 3494; Evans vs. United States, 153 U. S. 584, 38 L. Ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668. Plant thereupon gave *the bank checks* and commercial paper *to pay the balance*. It was to his personal interest to conceal any fact which would prevent the Macon bank from receiving paper in satisfaction of a debt which had been unlawfully contracted by reason of his official position. An element of that interest was that he should conceal not only the fact of his insolvency, but the fact of his indebtedness to the Nashville bank, lest Macon bank should thereby refuse, to take the $3,000.00 check at its face value. Without, therefore, inquiring as to what would have been the duty of the Macon bank had it known of Plant's insolvency and indebtedness on the $50,000.00 drafts, we hold that as it had no such knowledge in fact, it was not charged with such knowledge in law." (Emphasis ours).

The rule announced in the *Miller* case was distinguished from that applied in *Curtis C. & H. Co.* v. *U. S.*, 262 U. S. 315, 67 L. Ed. 956. There the Vice President of the corporation, entrusted without restrictions to procure title to lands patented by the government, exercised fraud in such procurance Other stockholders in the corporation were named Collins and Curtis. Mr. Justice Taft first stated that Plant, in the *Miller* case, was engaged in something in which his interest was plainly independent of any agency of his on behalf of the bank, and continued to say:

"The interest of Collins, Curtis, and Holbrook in the acquisition of the title was common. Curtis and Collins knew exactly how far Holbrook's interest was adverse to theirs, but trusted him in the joint enterprise notwithstanding. The adverse interests, as be-

> tween them, in sharing the fruits of the common business, cannot enable the company to retain its share and repudiate the agent with all he knew."

It should be remembered that in that case no safeguard was imposed upon Holbrook's activities, other than that the paper titles procured should be examined by a reputable attorney. In the present case, the bank not only had a Board of Directors which met monthly (R. 168) to conduct the affairs of the bank, but likewise had a special Discount Committee which made written reports of all notes discounted, etc. (R. 169). These facts alone, coupled with the fact that Thomas had no general authority to loan over a thousand dollars ($1,000.00) (R. 165) should remove this case from the reach of the "sole actor" doctrine. At least, we think the better authorities so hold (See *State Savings Bank* v. *Montgomery*, 126 Mich. 327, 85 N. W. 879, 882).

We believe Thomas must be considered to have acted independently of his agency with the bank in the transaction involved. Respondent pleaded Thomas acted for both the bank and the Brick Co. (R. 7). Petitioner pleaded in effect that Thomas acted for himself alone, in that the transaction constituted a personal loan to him by respondent (R. 22). Thomas positively testified in support of these allegations (R. 149). The jury, under our contentions, definitely determined that Thomas acted independently of his agency with petitioner (Issues 14 through 17, R. 41-42). In any event the implied findings of the court so established.

Could Thomas act in a representative capacity with petitioner, in negotiating a loan to himself personally? We think this question unalterably answered by the opinion in the case of *Fed. Dep. Ins. Corp.* v. *Vest*, 122 Fed. (2d) 765 where the defendant gave his note to the bank, and

then gave the proceeds to its president, Morton. The court thus spoke of Morton's part in the transaction:

> "His role was that of borrower and not as representative of the lending bank. He was the only bank official active in the transaction and he obviously did not, nor could, represent the bank, since he was dealing with himself."

We earnestly believe that Thomas could no more represent petitioner in the present instance, in procuring a personal loan through Tittle, than Morton could have represented his bank procuring a personal loan through Vest.

It is interesting to note that the Texas Supreme Court considered itself bound by a Texas decision which is directly in conflict with the *Vest* case.[7] In the *Goldstein* case the bank was charged with the knowledge of its Vice President Walker on the "sole actor" doctrine. Yet, Walker was co-maker of the note on which Goldstein was sued, and actually did borrow the funds personally. Apparently, the Texas court saw no harm in permitting Walker to act both as lender and and as borrower. The Federal courts have always held to the contrary.

We do not burden the court with further discussion of authorities, but do refer to the cases of *Kean* v. *National City Bank*, 294 Fed. 214 and *Anderson* v. *General Am. Life Ins. Co.*, 141 Fed. (2d) 898, in each of which cases the authorities are exhaustively discussed. We believe, as stated in the later of such decisions, that in no case "closely akin to the instant controversy has the sole actor doctrine been so applied as to impute to a principal knowledge of the fraudulent conduct of an agent." If the Texas *Goldstein* case does so, the time for removing its stigma on decisions under the National Banking Act is overripe.

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[7] *Goldstein* v. *Union National Bank*, 109 Tex. 555, 213 S. W. 584.

Point Four (Restated)

THE TEXAS SUPREME COURT ERRED IN HOLDING THAT THE VERBAL AGREEMENT OF DECEMBER 31, 1941, MADE CONTEMPORANEOUSLY WITH THE EXECUTION OF RESPONDENT'S NOTE, DID NOT CHANGE THE MANNER AND TIME OF PAYMENT OF THE ORIGINAL NOTE, IN VIOLATION OF THE PAROL EVIDENCE RULE.

Argument and Authorities under Point Four

The gist of the agreement of December 31, 1941 was to change the time and manner of payment of Respondent's note. Relying upon the ubiquitous *Goldstein* case, and also that of *Commercial State Bank* v. *Ellington*, 24 S. W. (2d) 359, the Texas Supreme Court held that the agreement was admissible to show payment of the note, as distinguished from one which would change the time and manner of payment of the same. As we pointed out in that court, we frankly cannot see any distinction between the basic facts in the *Ellington* case, (24 S. W. (2d) 359), and the extremely similar facts in the case of *Robertson* v. *City National Bank*, 36 S. W. (2d) 481. Most certainly, we feel the facts in the present case bring it squarely within the reach of the *Robertson* decision, wherein it was said:

> "The note being executed for a valuable consideration parol evidence was not admissible to show an agreement on the part of the makers with appellees' cashier that they would *not be required to pay such note but that the same would be paid out of the assets of the Guaranty State Bank.* Such evidence tends to vary the unconditional promise of the makers to *pay* such instrument according to its tenor and effect, which is not permissible in the absence of a plea of fraud, accident, or mistake." (Citing authorities.) (Emphasis ours.)

The decisions of this court uniformly support our contention as we see it. Thus it was said in *Brown* v. *Spofford*, 95 U. S. 474, 482, that:

> "Parol evidence of an agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or *to provide for the payment out of any particular fund*, or in any other way than that specified in the instrument, or to make the payment depend upon condition. Chitty, Contr. (10th Ed.), 99; Abrey v. Crux, Law. Rep. 5 C. P. 41; Allan v. Furbish, 4 Gray, 514; 2 Pars. Bills and Notes, 501." (Emphasis ours.)

It must be borne in mind that the agreement relied on to show payment failed to fix any time whatever for payment of the note, but vaguely referred to funds the Brick Co. hoped to collect in the future.

A full discussion of the cases on the point raised may be found in 71 A. L. R., page 556, notes 25 and 26 thereof indicating to the writer that the Texas cases seem to fall on both sides of the fence.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of supervisory powers, in order that the National Bank Act may be uniformly administered throughout the several states, and that the policy of bank examinations serving a useful purpose may remain effective in Texas, and that to such an end the Writ of Certiorari should be granted and this court should review the decision of the Supreme Court of Texas and finally reverse it.

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